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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JEFFREY L. ROSEN, Plaintiff, Cross-defendant and Respondent, v. NANCY STOVALL, Defendant, Cross-complainant and Appellant.	B205600 (Los Angeles County Super. Ct. No. GC036313)

APPEAL from an order of the Superior Court of Los Angeles County. C. Edward Simpson, Judge. Modified and affirmed.

Kralik & Jacobs, John J. Kralik and Anastasia E. Bessey for Defendant, Cross-complainant and Appellant.

The Krolikowski Law Firm, Adam J. Krolikowski and Rebekah C. Bhansali for Plaintiff, Cross-defendant and Respondent.

Defendant Nancy Stovall appeals the trial court's order granting plaintiff Jeffrey Rosen's motion for a new trial. We modify the order to preclude a new trial as to the contract-related causes of action in Rosen's complaint, to which the delayed discovery rule is factually inapplicable. However, the order is otherwise affirmed and not an abuse of the trial court's discretion to the extent it permits a new trial of the issues resolved adversely to Rosen in Stovall's cross-complaint.

FACTUAL AND PROCEDURAL SUMMARY

For many years, Rosen engaged in various business deals and several partnership transactions with Stovall, as well as others who are not involved in this litigation. One real estate transaction involved an apartment complex in Phoenix, Arizona. Stovall acted as the general partner in control of the Phoenix apartments. She sold the Phoenix apartments without Rosen's knowledge and kept the profits from the sale.

At the same time, Rosen was managing a shopping center on West 40th Street in San Bernardino, California. Rosen and Stovall were the only two partners in this venture. The 40th Street Center had a $225,000 note at a 9.5 percent rate of interest. Rosen repeatedly but unsuccessfully requested a contribution from Stovall to enable the refinancing of the property. Ultimately, Rosen gave Stovall notice that her failure to contribute to the refinancing and repairs at the property would decrease Stovall's ownership interest from 20 to 9 percent, as a setoff for Rosen's increased contribution to the 40th Street partnership. Rosen paid the matured note on the property in the amount of $225,000 by taking a second on his own home, thereby arguably reducing Stovall's interest from 20 to 9 percent in the 40th Street Center.

After Rosen discovered the sale of the Phoenix apartments, he requested his share of the profits. Stovall refused to pay him any money from the sale, and Rosen sued for the proceeds owed to him from the sale of the Phoenix apartments. He filed a complaint alleging causes of action for an accounting and breach of contract regarding the Phoenix apartments, seeking his share of the sale proceeds and an accounting of the rents and profits.

In response to the complaint, Stovall filed a general denial and cross-complaint regarding the 40th Street Center. She alleged causes of action for breach of fiduciary duty, breach of a written agreement, refusal to provide partnership agreement, refusal of a lawful demand for inspection, dissolution of partnership, an accounting, wrongful appropriation of property, and elder abuse.

The trial court granted Rosen's motion to bifurcate the trial and have the court, sitting without a jury, try the equitable issues in Stovall's cross-complaint relating to partnership dissolution and accounting, prior to a jury trial of the legal issues. The court also granted Stovall's motion to amend her cross-complaint to add a new cause of action for dissociation of the partnership.

After the first phase of the trial on equitable issues, the court found in Stovall's favor on her cause of action for dissociation of the partnership. It found the reasonable market value of the partnership to be $1,750,000, and the value of Stovall's partnership interest to be 20 percent of the fair market value, or $350,000. Furthermore, the court found that Rosen, as the sole remaining partner of the 40th Street partnership, was individually liable for the entire judgment.

On Stovall's cause of action for failure to produce the partnership agreement and the cause of action for refusal of a lawful demand for inspection, the court issued an injunction, enjoining Rosen from refusing Stovall access to the partnership records. On the cause of action for an accounting, the court ordered Rosen to return $1,638.38 to Stovall. The court also held that Stovall was entitled to reasonable attorney fees and costs of expert witnesses, pursuant to Corporations Code, section 16701, subdivision (i).

The second phase of the trial was before a jury, which resolved the remaining legal issues. The jury found in favor of Stovall on her claim of breach of fiduciary duty, but in favor of Rosen on her claim of financial abuse of an elder. The jury awarded compensatory damages to Stovall in the amount of $356,000, representing the difference in value of what she had received in the exchange of two partnership interests; i.e., an exchange in 2004 of her 10 percent interest in a Del Rosa Plaza partnership for her

20 percent interest in the 40th Street partnership. The jury also awarded her $350,000 for the value of her 20 percent interest in the 40th Street partnership and $300,000 in punitive damages.

Thereafter, Rosen moved for a new trial. The court specifically reviewed "the record and evidence in this case" and then granted the motion for a new trial on the statutory grounds of irregularities in the proceedings by the court and Stovall, insufficiency of the evidence to justify the verdict, and errors in law excepted to by Rosen. (Code Civ. Proc., § 657.)[1]

In its written opinion granting the motion for a new trial, the court observed that Stovall had recovered over $1,000,000 on her 1998 partnership investment of $40,000, and stated in pertinent part as follows: "Insofar as the bifurcated trial on the equitable issues of partnership dissolution and accounting, the court committed error in summarily granting nonsuit and dismissing Jeffrey Rosen's complaint. A triable issue of fact for the jury of whether his claims were subject to the delayed discovery rule and therefore brought within the applicable period of limitations. This was sufficient to constitute both an error of law and an irregularity in proceedings. Secondly, the court committed error in suggesting, on its own initiative, that Nancy Stovall's cross-complaint for dissolution be amended to one for the dissociation of a partner. Rosen and Stovall were the only two partners in the 40th Street partnership and dissolution rather dissociation was her appropriate remedy. This error also led to the court's erroneous award of attorney fees.

"[Stovall's] closing argument to the jury overly sought to seek the sympathy, prejudice and bias of the jury, which, in the court's view rose to the level of an irregularity in the proceedings. Counsel made repeated requests to punish [Rosen] and repeatedly sought the jury's sympathy towards [Stovall]. Illustrative of which was [counsel's] argument that Stovall had 'buried two husbands' a comment which had nothing to do with her dealings with [Rosen].

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[1] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

"Finally, the jury's award of damages arising out of [Stovall's] exchange of her interest in the Del Rosa Partnership for her interest in the 40th Street Partnership is not, in the court's view after reweighing the entire evidence, supported by that evidence. That exchange occurred on July 1, 2004 and there was no reliable evidence as to the relevant values of the two partnerships at that time. Also, depending on how the partnership accounted for the monies used to discharge the Veena Menda encumbrance in the fall of 2004, [Stovall's] interest in the 40th Street Partnership could have been 9% rather than 20%. If [Rosen] had made a capital contribution for the payment of the encumbrance, [Stovall's] interest would have been reduced to 9%. On the other hand, had [Rosen] loaned the partnership that money, then his loan would need to be repaid before the court or jury could have calculated [Stovall's] equity in the 40th Street Partnership.

"For these reasons, the court grants [Rosen] a new trial on all issues resolved adversely to him. The granting of a new trial reopens discovery. . . ."

Stovall appeals the order granting a new trial.

DISCUSSION

I. The standard of review.

The standard or review applicable to an order granting a motion for a new trial is abuse of discretion. "The trial court . . . is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials. The only relevant limitation on this discretion is that the trial court must state its reasons for granting the new trial, and there must be substantial evidence in the record to support those reasons." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.) "'Review is limited to the inquiry whether there was any support for the trial judge's ruling, and the order will be reversed only on a strong affirmative showing of abuse of discretion.'" (*Bell v. State of California* (1998) 63 Cal.App.4th 919, 931.)

A new trial may not be granted "on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of

the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "Nonetheless, the weight of modern California authority is that the trial court's order granting a new trial will not be disturbed if fairly debatable, even if the reviewing court itself, addressing the issues de novo, would not have found a basis for reversal. [Citations.] In particular, the traditional rule is that the reviewing court will not substitute its judgment for the trial court's determination that *error was prejudicial*, and thus warrants a new trial." (*People v. Ault* (2004) 33 Cal.4th 1250, 1263.) "[I]n reviewing an order granting a new trial, the appellate court will independently review an issue of law [citations] but will defer to the trial court's judgment on the issue of prejudice because that issue involves an assessment based on the entire record of the proceedings before the trial court, and it is thus more suitably made by the trial court." (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 639-640.)

II. The trial court did not abuse its broad discretion or otherwise err in ordering a new trial.

A. The trial court complied with section 658.

Stovall complains that court erred in granting the motion for a new trial because it was not accompanied by any supporting affidavits. Section 658 provides that when an application for a new trial is made under several of the applicable subdivisions, "it must be made upon affidavits; otherwise it must be made on the minutes of the court." However, within the meaning of this statute, the phrase "the minutes of the court" includes all the records of the proceedings before the trial court, including the exhibits admitted into evidence and the trial transcripts. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1192.) Because the trial court specifically stated it had reviewed "the record and evidence in this case," it therefore complied with section 658.

B. The dismissal of Rosen's complaint was not an irregularity in the proceedings within the meaning of section 657, because the delayed discovery rule was factually inapplicable.

The trial court found that its prior grant of a nonsuit and dismissal of Rosen's complaint, thereby allowing only the cross-complaint to proceed to trial, was an irregularity in the proceedings. In granting a new trial, the court found that a "triable issue of fact [existed] for the jury [as to] whether [Rosen's] claims were subject to the delayed discovery rule and therefore brought within the applicable period of limitations."

The delayed discovery rule "delays accrual [of a cause of action] until the plaintiff has, or should have, inquiry notice of the cause of action. . . . [P]laintiffs are charged with presumptive knowledge of an injury if they have '"'information of circumstances to put [them] *on inquiry*"' or if they have '"'*the opportunity to obtain knowledge* from sources open to [their] investigation.'"' [Citation.] In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807-808, fn. omitted.)

The delayed discovery rule has long been applied to professional malpractice where there is a fiduciary relationship and to various other tort actions. (See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 186-189; *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 99-101.) But, the delayed discovery rule generally does not apply to breach of contract actions, which ordinarily accrue at the time of breach. (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 520, pp. 664-665, § 529, pp. 678-680.) However, two California cases (both decided by Division Seven of this court), *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805 and *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1 (*Gryczman*), have applied the delayed discovery rule to the statute of limitations in a contract action (see § 337) not involving a claim of fraud.

In *April Enterprises, supra,* 147 Cal.App.3d 805, the situation involved the "clandestine" destruction of certain videotapes in the defendant's exclusive custody and control. (*Id.* at p. 827.) The court dealt with what it described as "unusual facts" calling "for an exception to the general rule" (*id.* at p. 832), and held that "the discovery rule may be applied to breaches which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." (*Ibid.*) *April Enterprises* specifically extended the discovery rule beyond the plaintiff's cause of action for breach of fiduciary duty to encompass the cause of action for breach of contract as well because, as in other cases where the delayed discovery rule is applied: (1) the injury was "difficult for the plaintiff to detect"; (2) the defendant was in "a far superior position to comprehend the act and the injury"; and (3) the defendant "had reason to believe the plaintiff remained ignorant he had been wronged." (*Id.* at p. 831.)

In *Gryczman,* the same court that decided *April Enterprises* reiterated its holding and explained that "application of the [delayed] discovery rule was not governed by the presence of deliberate concealment or a heightened level of duty to the plaintiff but by two overarching principles: '[P]lanitiffs should not suffer where circumstances prevent them from knowing they have been harmed' and 'defendants should not be allowed to knowingly profit from their injuree's ignorance.'" (*Gryczman, supra,* 107 Cal.App.4th 1, 5-6, fn. omitted.) In *Gryczman,* the plaintiff had a contractual right of first refusal to buy certain property from the defendant. The defendant failed to give contractually required notice to the plaintiff that the right of first refusal had been triggered, and the defendant sold the property to a third party. After the statute of limitations had passed, the plaintiff discovered that the property had been sold and sued for breach of contract. The appellate court found the statute of limitations was not a bar, based on the rationale in *April Enterprises.* In fact, *Gryczman* deemed it "an even stronger case for applying the delayed discovery rule . . . [because] the act which constituted the breach—failure to give notice

of the option offer—was the very act which prevented plaintiff from discovering the breach." (*Id.* at p. 5.)

Rosen contends that he satisfies the requirements of the delayed discovery rule because (1) he could not have detected the act that was harming him because the complex was in Arizona and he was in California, (2) Stovall was in a superior position to comprehend the act because she was the one in direct control and management of the apartment building, and (3) Stovall knew that Rosen was unaware that she sold the building because he had not requested a return of his share of the investment funds. Rosen thus urges he is entitled to present his case to a jury, and that the trial court's grant of the nonsuit was an irregularity in the case that supports the order directing a new trial.

Stovall argues, in pertinent part, that Rosen's alleged difficulties in detecting Stovall's purported breaches were illusory. For example, Rosen knew he was not receiving any payments from the Phoenix apartments after he stopped managing the apartments, which occurred in approximately 1985. At trial, he complained that Stovall did not share in the alleged income. Yet, Rosen took no legal action until 2005.

Moreover, the evidence at trial established that Rosen abandoned his management duties and the obligation to take care of the expenses on the property, both of which were required for the preservation of his interest under the 1984 contract. His alleged ignorance of the management issues regarding the property thus flowed from his own repudiation of responsibilities. Such self-imposed and unjustified ignorance can hardly form the basis of a delayed discovery claim.

Nor is there any merit to Rosen's reliance on the fact that he lived in California and that the breaches were thus difficult to detect. At trial, Rosen indicated that he went to the property many times and noted changes in the property over the years and repeatedly made his opinions known to Stovall regarding the management of the property. Thus, Rosen was not at all in an inferior position to comprehend the wrongful act or injury.

The "overarching principles" articulated in *April Enterprises* do not support application of the delayed discovery rule here. (See *April Enterprises*, *supra*, 147 Cal.App.3d at p. 831.) Rosen did not "suffer" from circumstances that "prevented [him] from knowing [he] ha[d] been harmed." (*Ibid.*) There was no evidence that Stovall "knowingly profit[ed] from [Rosen's] ignorance." (*Ibid.*) The present case is distinguishable from *Gryczman*, where the very breach alleged (i.e., the failure to give notice) was what caused the harm, because here Stovall had no contractual duty to provide notice to Rosen.

Accordingly, the delayed discovery rule does not apply to the present case. Thus, the trial court properly ruled initially in granting a nonsuit and dismissal of Rosen's complaint, and it erred in granting a new trial as to Rosen's breach of contract complaint based on its view of the delayed discovery rule.

C. The trial court did not abuse its discretion in granting a new trial as to Stovall's claims based on the closing argument by Stovall's counsel.

"The judge who presides over the trial, who hears the testimony and the arguments, and whose own experience gives him a fine sense of the general atmosphere of trial proceedings, is in a far better position than appellate judges to evaluate the effect of disputed argument." (*Henninger v. Soughern Pacific Co.* (1967) 250 Cal.App.2d 872, 881.) Thus, as here, where the trial judge has granted a party's motion for a new trial, in part on the ground that opposing counsel was guilty of misconduct which denied the other party a fair trial, "the trial judge's determination of that issue will not be set aside on appeal unless it is unquestionably wrong." (*Ibid*.)

In the present case, the trial court found that the closing argument by Stovall's counsel inappropriately "sought to seek the sympathy, prejudice and bias of the jury," which rose to the level of an irregularity in the proceedings, within the meaning of the new trial statute. As emphasized by the trial court, Stovall's counsel urged punishing Rosen and repeatedly sought the jury's sympathy, such as when counsel remarked that

Stovall had buried two husbands, which obviously had nothing to do with the legal issues between Stovall and Rosen.

Near the end of the closing argument, Stovall's counsel tried to invoke sympathy for his client: "[S]ometimes people get hurt and we don't want that to happen. Here someone got hurt. Mrs. Stovall got hurt. She's sitting here . . . wondering if she's going to get her retirement investment that she worked long and hard for. She's become thin, worried, and sleepless. She got hurt. Somebody else might have been hurt worse. Somebody else may get hurt worse unless you send a message that this is not what should happen in this community. This is not the way we want our fathers treated or grandfathers, our mothers or grandmothers. When we retire, this is not the way we want to be treated. This is not the way we want our retirement investments [to] end. [¶] . . . [She's an] elderly lady. She needs to get out of this kind of investment. She needs to go on with her life." Counsel then further argued that Stovall was a "decent woman who has worked all her life. She's worked hard for her investments. She's buried two husbands. She's cared for a husband for 10 years with Alzheimer[s], she does not deserve to have her interest [in the 40th Street partnership] handled this way."

Stovall argues that evidence admitted at trial showed that Rosen, in correspondence with Stovall, had described Stovall as greedy, lazy, stupid and a cheater, and that the evidence in fact revealed that she was widowed twice and took care of one of her husbands. Nonetheless, counsel's personal opinion of his client's good character, elderly status, and deserving nature played on the jury's sympathy.

We acknowledge that a case cannot be sterilized of all emotion. (See *Bigboy v. County of San Diego* (1984) 154 Cal.App.3d 397, 408.) However, in the present case, the appropriateness of the trial court's reliance on counsel's comments as a basis for a new trial is at best only "fairly debatable" and thus not subject to reversal. (*People v. Ault, supra,* 33 Cal.4th at p. 1263.) We "defer to the trial court's judgment on the issue of prejudice" (*Oakland Raiders v. National Football League, supra,* 41 Cal.4th at p. 640),

and find no "'strong affirmative showing of abuse of discretion.'" (*Bell v. State of California, supra,* 63 Cal.App.4th at p. 931.)

Accordingly, the trial court did not abuse its broad discretion in ordering a new trial because of misconduct during closing argument.

D. The trial court did not abuse its discretion in granting a new trial as to Stovall's claims based on its error in permitting Stovall to amend the complaint to allege dissociation of a partner.

In granting the new trial motion, the trial court ruled, in pertinent part, as follows: "[T]he court committed error in suggesting, on its own initiative, that Nancy Stovall's cross-complaint for dissolution be amended to one for the dissociation of a partner. Rosen and Stovall were the only two partners in the 40th Street Partnership and dissolution rather dissociation was her appropriate remedy. This error also led to the court's erroneous award of attorney fees."

It is legally impossible to dissociate from a two-person partnership, because the purpose of dissociation is to allow the partnership entity to continue with the remaining partners (Corp. Code, § 16701 et seq.)—an impossibility given that a partnership must have, by definition, at least two partners. (Corp. Code, § 15501.) Here, one remaining person obviously could not maintain a partnership. Also, when a partner dissociates from a partnership, the partnership buys out the partner's interest and indemnifies the dissociated partner against all partnership liabilities (Corp. Code, § 16701, subds. (b), (d)), thus implying a continuing partnership situation, which is impossible with only one person remaining. Moreover, because Rosen never took any steps to expel Stovall from the partnership or to cause her dissociation, and Stovall never gave notice or otherwise indicated any intent to withdraw from the partnership, a necessary prerequisite for dissociation was lacking. (See Corp. Code, § 16601.)

Hence, the trial court aptly concluded that it had erred, and the matter should have been treated as a partnership dissolution rather than a dissociation. This difference was particularly prejudicial because of its effect on the award of damages. If the matter had

been treated as an action for dissolution of a partnership, rather than dissociation, the market value of the property as a factor in damages would not have been at issue. Rather, relief obtained would have been the liquidated distribution of the partnership assets with all profits credited and losses charged before a distribution. (Corp. Code, § 16807.) The result of an action to dissolve a partnership would be an order directing sale of the partnership property and distribution of the proceeds, not a money judgment such as ensued in this matter erroneously treated as a dissociation. Also, as noted in Rosen's motion for a new trial, Stovall's proof of the market value of the property was received by the court over objection on several grounds, including relevance and the competency of the appraiser's opinion. Finally, the only basis for the trial court's award of attorney fees was Corporations Code section 16701, subdivision (i), which applies only to buyouts and dissociations, not to partnership dissolutions.

E. The trial court's conclusion that the evidence was insufficient to support the jury's award of damages.

The remaining basis for the trial court's new trial order was its conclusion, after reweighing the evidence, that the jury's award of damages arising out of Stovall's exchange of her interest in the Del Rosa partnership for her interest in the 40th Street partnership was not supported by the evidence. Stovall contends the trial court applied the wrong measure of damages, and that the trial court's reasoning was based on its speculation and not on the evidence.

However, it is unnecessary to address the remaining issues argued by Stovall because the trial court's new trial order is amply supported by its other stated reasons, which we have previously discussed. "[I]f the *decision* of a lower court is correct on any theory of law applicable to the case, the judgment or order will be affirmed regardless of the correctness of the [other] grounds [on] which the lower court reached its conclusion." (*Estate of Beard* (1999) 71 Cal.App.4th 753, 776.) "Upon an appeal from an order granting a new trial, all presumptions favor the order as against the verdict [citations] and the order will be affirmed if it may be sustained on any ground [citations] although the

reviewing court might have ruled differently in the first instance." (*Mazzotta v. Los Angeles Ry. Corp.* (1944) 25 Cal.2d 165, 169.)

DISPOSITION

The order granting a new trial is modified to preclude a new trial as to the contract-related causes of action in Rosen's complaint, but to permit a new trial as to issues resolved adversely to him in Stovall's cross-complaint. In all other regards, the order under review is affirmed.

Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.